

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KENNETH SCHIRO,
Plaintiff,
v.
STEPHEN CLARK, ET AL.,
Defendants.

3:10-cv-00203-RCJ-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

December 8, 2011

This Report and Recommendation is made to the Honorable Robert C. Jones, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' partial motion to dismiss (#35).¹ Plaintiff opposed (#40) and defendants replied (#41). Plaintiff subsequently filed a document styled, "supplemental opposition to defendants [sic] partial motion to dismiss" (#43). Also before the court is defendants' motion to strike plaintiff's supplemental opposition (#46). Plaintiff opposed (#49) and defendants replied (#50). Plaintiff filed a supplemental affidavit (#53) pursuant to this court's minute order, which offered plaintiff the opportunity to attest to the fact that grievance forms he submitted with his opposition are true and correct copies (#52). The court has thoroughly reviewed the record and recommends that defendants' partial motion to dismiss (#35) be granted in part and denied in part, and defendants' motion to strike (#46) be granted.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Kenneth J. Schiro ("plaintiff"), a *pro se* inmate, is currently incarcerated at Ely State Prison ("ESP") in the custody of the Nevada Department of Corrections ("NDOC") (#18). The events which pertain to plaintiff's complaint occurred while plaintiff was housed at Lovelock Correctional Center ("LCC") (#12). Pursuant to 42 U.S.C. § 1983, plaintiff filed his civil rights

¹ Refers to the court's docket number.

1 complaint, alleging violations of his First, Eighth, and Fourteenth Amendment rights (#1-1). Under
 2 the prison mailbox rule, plaintiff's complaint was deemed filed on April 6, 2010.² The court
 3 screened the complaint pursuant to 28 U.S.C. § 1915A and allowed certain claims to proceed (#11).

4 Plaintiff filed a one-count complaint, alleging seven different claims for relief (#12). Of
 5 those, the court allowed six claims to proceed (#11).³ Defendants now move to dismiss four of the
 6 remaining claims: (1) Eighth Amendment claim against defendant Hegge for failing to protect
 7 plaintiff from his cellmate, inmate Garnica; (2) Eighth Amendment claim against defendant Chacon
 8 for showing deliberate indifference when she assigned plaintiff to the same cell as inmate Garnica;
 9 (3) First Amendment retaliation claim against defendant Herrera; and (4) Fourteenth Amendment
 10 equal protection claim against defendant Jimenez (#35).

11 Plaintiff's claims arise out of an incident in December 2007,⁴ when his cellmate, inmate
 12 Garnica, allegedly sexually assaulted plaintiff (#12, p. 6).⁵ However, inmate Garnica accused
 13 plaintiff of sexual assault, and the prison found plaintiff guilty of sexual assault. *Id.* at 11. First,
 14 plaintiff alleges that on December 17, 2007, defendant Hegge acted with deliberate indifference to
 15 plaintiff when he failed to protect him after plaintiff repeatedly informed defendant Hegge of his
 16 cellmate's aggressive sexual propensities and requested a cell change. *Id.* at 5, 14. Second, plaintiff

18 ² Plaintiff's complaint is dated March 25, 2010 (#12). However, plaintiff's complaint was not
 19 filed in this court until April 9, 2010, because plaintiff incorrectly mailed the complaint to a state court (#1-
 20 2). Under the prison mailbox rule, a complaint by a pro se prisoner is deemed "filed" when handed by the
 21 prisoner to a prison official for mailing. *Houston v. Lack*, 487 U.S. 266, 270-71 (1988). Because plaintiff's
 22 complaint arrived at this court on April 9, 2010, it is almost certain that he handed it to prison officials for
 23 mailing by April 6, 2010.

24 ³ After screening, the court permitted the following claims to proceed: (1) Fourteenth
 25 Amendment due process claim against defendant Clark; (2) Eighth Amendment failure to protect claim
 26 against defendant Hegge; (3) First Amendment retaliation claim against defendant Herrera; (4) Eighth
 27 Amendment claim against defendant Chacon; (5) Fourteenth Amendment claim against defendant Jimenez;
 and (6) supervisory liability claims against defendants Tooker, Legrand, Halstead, and Palmer (#11).

28 ⁴ While plaintiff at times identifies this incident as occurring in December 2008, this is a
 29 clerical error as such events occurred in December 2007, as evidenced by the balance of his complaint, his
 30 opposition, and defendants' and plaintiff's exhibits.

31 ⁵ Page number references to the plaintiff's complaint utilize the numbering generated by the
 32 electronic case filing system.

1 alleges defendant Chacon violated plaintiff's Eighth Amendment rights when on December 7, 2007,
 2 she moved inmate Garnica into the same cell as plaintiff, knowing that Garnica and plaintiff "had
 3 issues" when they lived together in the past. *Id.* at 5, 15. Third, plaintiff alleges defendant Herrera
 4 violated plaintiff's First Amendment rights when he retaliated against plaintiff for filing grievances
 5 and requesting due process. *Id.* at 15. Finally, plaintiff alleges that on February 17, 2008, defendant
 6 Jimenez violated plaintiff's Fourteenth Amendment equal protection right when she discriminated
 7 against plaintiff based on his race and believed his cellmate's accusations against plaintiff. *Id.* at 16.

8 Defendants move to dismiss three of these claims and argue plaintiff's Eighth Amendment
 9 claims against defendants Hegge and Chacon, and his Fourteenth Amendment claim against
 10 defendant Jimenez are barred by the statute of limitations (#35, p. 4). Defendants also move to
 11 dismiss these claims and plaintiff's First Amendment claim against defendant Herrera for failure to
 12 exhaust his administrative remedies pursuant to the Prison Litigation Reform Act ("PLRA") and
 13 Administrative Regulation ("AR") 740. *Id.* at 5. Defendants argue plaintiff "never grieved or
 14 completed all three levels of the grievance process" as to his Eighth Amendment claims against
 15 defendants Chacon and Hegge, his First Amendment claim against defendant Herrera, and his
 16 Fourteenth Amendment claim against defendant Jimenez. *Id.* at 7.

17 To support these assertions, defendants attach an affidavit authenticating plaintiff's inmate
 18 grievance history, which includes all grievances plaintiff filed from February 10, 2007 through
 19 February 10, 2011, and an affidavit authenticating a copy of the relevant version of NDOC AR 740
 20 (#35-1, Ex. A). In addition to the Nevada Offender Tracking and Information System ("NOTIS")
 21 report which contains a summary of all plaintiff's grievances, defendants also attach copies of
 22 several actual grievances (#35-2, #35-3, #35-4, Exs. C, D, E, F). The court now examines plaintiff's
 23 inmate grievance history as to each claim.

24 **A. Eighth Amendment Claims Against Defendants Hegge and Chacon, and
 25 Fourteenth Amendment Claim Against Defendant Jimenez**

26 The court notes plaintiff's inmate grievance history reveals no references to plaintiff's
 27 Eighth Amendment claims against defendants Hegge and Chacon, or to his Fourteenth Amendment
 claim against defendant Jimenez (#35-1, Ex. B). Specifically, plaintiff never filed any grievance

1 regarding his claims that: (1) defendant Hegge violated plaintiff's Eighth Amendment rights when
 2 he ignored plaintiff's request for a new cell assignment; (2) defendant Chacon violated plaintiff's
 3 Eighth Amendment rights when she assigned inmate Garnica to the same cell as plaintiff; or (3)
 4 defendant Jimenez violated plaintiff's Fourteenth Amendment right when she discriminated against
 5 him based on his race.

6 **B. First Amendment Claim Against Defendant Herrera**

7 However, there is a grievance which relates to plaintiff's First Amendment claim against
 8 defendant Herrera. From the grievance history defendants provide, plaintiff filed informal grievance
 9 number 2006-27-00713 on March 23, 2008, alleging that NDOC violated his "constitutional, civil,
 10 and statutory rights," including "equal protection," when defendant Herrera charged plaintiff with
 11 sexual assault (#35-3, Ex. D, p. A-2).⁶ On March 27, 2008, NDOC denied plaintiff's informal
 12 grievance number 2006-27-00713. *Id.* at 13. On April 7, 2008, plaintiff filed first level grievance
 13 number 2006-27-00713, which NDOC denied. *Id.* at 14-16. On July 15, 2008, plaintiff filed
 14 informal grievance number 2006-27-48267, alleging that he had not received a response from NDOC
 15 to his second level grievance number 2006-27-00713 (#35-4, Ex. F). On August 6, 2008, NDOC
 16 denied plaintiff's informal grievance number 2006-27-48267, indicating that "there is no record" that
 17 plaintiff filed second level grievance number 2006-27-00713. *Id.*

18 In his opposition, plaintiff argues there is a "missing grievance that vanished," referring to
 19 second level grievance number 2006-27-00713 (#40, p. 2; Ex A, p. 16). In support of this assertion,
 20 plaintiff attaches a copy of grievance number 2006-27-00713 (#40, Ex. A). Plaintiff supplemented
 21 his opposition with an affidavit which states that plaintiff's attachments are true and correct copies
 22 of grievances he submitted to prison staff (#53). Specially, plaintiff states that he submitted second
 23 level grievance number 2006-27-00713 to LCC staff. *Id.* at 1. In grievance number 2006-27-00713,
 24 plaintiff argues that defendant Herrera charged him with sexual assault, and that "being found guilty
 25 of a [sic] alleged felonious charge screams retaliation for filing this grievance" (#40, Ex. A, pp. A-2,

26
 27 ⁶ The court refers to the page numbers at the bottom of the grievance page.

1 16-17). Plaintiff filed second level grievance number 2006-27-00713 on April 25, 2008. *Id.* at A-16.
 2 Lastly, plaintiff asserts “special circumstances” excuse any failure to exhaust (#40, p. 10).

3 Plaintiff further argues the statute of limitations is tolled while plaintiff exhausts. *Id.* at 9.
 4 He states that “extraordinary events” such as conduct by a defendant, may cause a plaintiff to refrain
 5 from filing an action during the applicable period. *Id.* at 10. Plaintiff asserts he believed direct
 6 appeal of his disciplinary conviction was his only available remedy and the statute of limitations did
 7 not accrue until May 19, 2008 or May 20, 2008. *Id.* at 13.

8 In their reply, defendants maintain that plaintiff failed to file grievances and complete the
 9 grievance process as to his Eighth Amendment claims against defendants Hegge and Chacon, his
 10 First Amendment claim against defendant Herrera, or his Fourteenth Amendment claim against
 11 defendant Jimenez, and that no exceptions apply to his failure to exhaust (#41, p. 2). Defendants
 12 also assert that the statute of limitations should not be tolled because plaintiff failed to exhaust. *Id*
 13 at 5. Defendants do not reply to plaintiff’s allegation of a missing grievance.

14 The court notes that the plaintiff is proceeding *pro se*. “In civil cases where the plaintiff
 15 appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff the benefit
 16 of any doubt.” *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

18 II. MOTION TO STRIKE

19 Defendants’ partial motion to dismiss was fully briefed pursuant to Local Rule 7-2.
 20 Nevertheless, plaintiff subsequently filed a document styled, “supplemental opposition to defendants
 21 [sic] partial motion to dismiss” (#43). This drew defendants’ motion to strike (#46). Plaintiff
 22 opposed (#49) and defendants replied (#50). Local Rule 7(b) outlines the briefing schedule for
 23 motions before the court and does not allow for the filing of an additional opposition, absent the
 24 court’s permission. Plaintiff filed this document without the court’s leave. Therefore, the court
 25 recommends that defendants’ motion to strike (#46) plaintiff’s “supplemental opposition to
 26 defendants [sic] partial motion to dismiss” be granted.
 27

III. DISCUSSION & ANALYSIS

A. Discussion

Failure to exhaust is an affirmative defense under the PLRA rather than a jurisdictional requirement, and defendants bear the burden of raising and proving that the plaintiff has not exhausted. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Wyatt v. Terhune*, 315 F.3d 1108, 1117 n.9 (9th Cir. 2003), cert. denied, 540 U.S. 810 (2003). Inmates are not required to specifically plead or demonstrate exhaustion in their complaints; rather, it is the defendant's responsibility to raise the issue in a responsive pleading. *Jones*, 549 U.S. at 216.

Failure to exhaust is treated as a matter in abatement, not going to the merits of the claim, and is properly raised in an unenumerated Rule 12(b) motion. *Wyatt*, 315 F.3d at 1119. The court may look beyond the pleadings to decide disputed issues of fact without converting the motion into one for summary judgment; however, “if the district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice.” *Id.* at 1119-20, as noted in *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1059 (9th Cir. 2007); see also *Rizta v. Int’l Longshoremen’s & Warehousemen’s Union*, 837 F.2d 365 (9th Cir. 1988) (“[F]ailure to exhaust nonjudicial remedies should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment.”).

1. Prison Litigation Reform Act of 1996

The PLRA amended 42 U.S.C. § 1997e to provide that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).

Although once within the discretion of the district court, the exhaustion of administrative remedies is now mandatory. *Booth v. C.O. Churner*, 532 U.S. 731 (2001). Those remedies “need not meet federal standards, nor must they be ‘plain, speedy, and effective.’” *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (citing *Booth*, 532 U.S. at 739-40 n.5). Even when the prisoner seeks remedies not available in the administrative proceedings, notably money damages, exhaustion is still required

1 prior to filing suit. *Booth*, 532 U.S. at 741. Recent case law demonstrates that the Supreme Court
2 has strictly construed section 1997e(a). *Id.* at 741 n.6 (“We will not read futility or other exceptions
3 into statutory exhaustion requirements where Congress has provided otherwise.”).

4 Plaintiffs must properly exhaust nonjudicial remedies as a precondition to bringing suit. The
5 PLRA requires “proper exhaustion,” meaning that the prisoner must use “all steps the agency holds
6 out, and doing so *properly* (so that the agency addresses the merits).” *Woodford v. Ngo*, 548 U.S.
7 81, 89 (2006). Requiring exhaustion prior to filing suit furthers the congressional objectives of the
8 PLRA as set forth in *Porter*, 534 U.S. at 524-25.

9 **2. NDOC Procedures**

10 “Applicable procedural rules [for proper exhaustion] are defined not by the PLRA, but by
11 the prison grievance process itself.” *Jones*, 549 U.S. at 218.

12 The NDOC grievance procedure is governed by AR 740 (#35, Ex. G, pp. 1-20). Defendants
13 attach to their motion the relevant version of AR 740, which was in effect at the time plaintiff filed
14 his grievances. *Id.* For plaintiff to exhaust available remedies at the time of his injury, AR 740
15 required the following: (1) an informal review level, which “shall be reviewed and responded to by
16 the inmate assigned caseworker” in consultation with other appropriate staff; (2) a first level formal
17 grievance, which “shall be reviewed and responded to by the Warden”; and (3) a second level
18 grievance, which “shall be reviewed and responded to by either the Assistant Director of Operations,
19 Assistant Director of Support Services, Offender Management Administrator, Medical Director, or
20 Correctional Programs Administrator.” *Id.* at 10.

21 Once received, NDOC logs informal grievances into a tracking system. *Id.* at 13. The
22 caseworker assigned to the grievance will provide the inmate with a response within twenty-five
23 days, unless more time is required to conduct further investigation. *Id.* at 14. If the inmate is not
24 satisfied by NDOC’s response to his informal grievance, he may appeal the decision within five days
25 by filing a first level grievance. *Id.* at 15-16. NDOC will provide a response within twenty days of
26 receipt of the first level grievance. *Id.* at 16. Finally, if the inmate is not satisfied with the first level
27 grievance outcome, he may file a second level grievance within five days of receiving the first level

1 grievance decision, to which the NDOC will respond within twenty days. *Id.* at 16-17. Inmates may
 2 proceed to the next grievance level if they do not receive a response within the time frame indicated
 3 in the regulation. *Id.* at 12. Upon completion of the grievance process, inmates may pursue civil
 4 rights litigation in federal court.

5 **B. Analysis**

6 **1. Statute of Limitations**

7 Defendants move to dismiss the following claims based on the applicable statute of
 8 limitations: (1) plaintiff's Eighth Amendment claim against defendant Chacon; (2) plaintiff's Eighth
 9 Amendment claim against defendant Hegge; and (3) plaintiff's Fourteenth Amendment claim against
 10 defendant Jimenez (#35, p. 5).

11 Section 1983 does not provide a statute of limitations. Federal courts apply the forum state's
 12 statute of limitations for personal injury claims. *The Comm. Concerning Cnty. Improvement v. City*
of Modesto, 583 F.3d 690, 701 n.4 (9th Cir. 2009). In Nevada, the statute of limitations for personal
 13 injury claims is two years. Nev. Rev. Stat. § 11.190(4)(e). Under federal law, a cause of action
 14 accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.
Kimes v. Stone, 84 F.3d 1121, 1128 (9th Cir. 1996). Pursuant to the PLRA, inmates must exhaust
 15 available administrative remedies before filing section 1983 actions in federal court. *See* 42 U.S.C.
 16 § 1997e. While an inmate is completing the mandatory exhaustion process, the applicable statute
 17 of limitations is tolled. *See Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005); *see also Wisenbaker*
v. Farwell, 341 F.Supp.2d 1160, 1165 (D.Nev. 2004).

18 **a. Plaintiff's Eighth Amendment Claims Against Defendants Hegge and**
Chacon, and Plaintiff's Fourteenth Amendment Claim Against
Defendant Jimenez

19 The grievance forms attached to defendants' motion and attached to plaintiff's opposition
 20 reveal that plaintiff did not file any grievances related to his Eighth Amendment claims against
 21 defendants Chacon and Hegge, or his Fourteenth Amendment claim against defendant Jimenez.

22 Plaintiff's claim against defendant Chacon accrued on December 7, 2007, when defendant
 23 Chacon allegedly violated plaintiff's rights by putting him and inmate Garnica in the same cell (#12,

1 p. 13). Plaintiff's claim against defendant Hegge for a failure to protect plaintiff accrued in
 2 December 17, 2007, when defendant Hegge failed to change plaintiff's cell. *Id.* at 14. Plaintiff knew
 3 or had reason to know of the injury which is the basis of these actions in December 2007. *See*
 4 *Kimes*, 84 F.3d at 1128. Pursuant to the prison mailbox rule, plaintiff brought this action on April
 5 6, 2010 (#1). Plaintiff was required to file suit regarding these claims by December 2009. More than
 6 two years have passed from the time defendants Chacon and Hegge allegedly violated plaintiff's
 7 rights and the date plaintiff filed his complaint.

8 Plaintiff's equal protection claim against defendant Jimenez accrued on February 17, 2008,
 9 when defendant Jimenez allegedly discriminated against plaintiff (#12, p. 7). Plaintiff was required
 10 to file suit regarding his claim against defendant Jimenez by February 17, 2010. More than two years
 11 have passed from the time defendant Jimenez allegedly violated plaintiff's rights and the date
 12 plaintiff filed his complaint.

13 Nonetheless, plaintiff contends the statute of limitations should be tolled the period of time
 14 in which plaintiff was exhausting his administrative remedies, because a defendant prevented him
 15 from filing his action during the applicable period (#40, pp. 9-10). Courts have allowed tolling while
 16 a plaintiff exhausts his administrative remedies. *See Wisenbaker*, 341 F.Supp.2d at 1164. However,
 17 in *Wisenbaker*, plaintiff exhausted his administrative remedies. *Id.* Here, plaintiff did not exhaust
 18 his administrative remedies as to these claims. The purpose of tolling in such cases is to ensure that
 19 the plaintiff has an opportunity to complete the mandatory exhaustion process without being
 20 prejudiced by the statute of limitations. *See Brown*, 422 F.3d at 942. The limited application of the
 21 equitable tolling in *Wisenbaker* does not apply to plaintiff in this case.

22 Plaintiff's argument that the statute of limitations is tolled when a litigant is prevented from
 23 filing a claim because of "extraordinary events" such as the conduct of a defendant is also
 24 unpersuasive for the simple reason that plaintiff does not allege that a defendant caused plaintiff to
 25 refrain from filing an action (#40, p. 10). It is telling that while plaintiff states that in March 2008,
 26 defendant Herrera told him not to file paperwork, plaintiff nevertheless filed numerous grievances
 27 after this date (#12, p. 8).

1 Finally, plaintiff argues that he believed a direct appeal of his prison disciplinary conviction
 2 was his only available remedy (#40, p. 10). Plaintiff's claims alleging Eighth Amendment violations
 3 against defendants Chacon and Hegge, and a Fourteenth Amendment violation against defendant
 4 Jimenez occurred before the prison charged plaintiff with disciplinary charges. It is illogical to
 5 believe that plaintiff thought he had to wait until charges were brought against him before filing
 6 grievances about defendants' alleged civil rights violations against him, and this is not an exception
 7 to the statute of limitations. Lastly, plaintiff's claim that tolling applies while he appealed his
 8 disciplinary charge fails because he was grieving the false charges against him and not his claims
 9 against the defendants. *Id.* at 13.

10 Plaintiff failed to file suit within the two-year applicable statute of limitations, and his Eighth
 11 Amendment claims against defendants Chacon and Hegge, and his Fourteenth Amendment claim
 12 against defendant Jimenez are untimely. The court recommends that defendants' partial motion to
 13 dismiss (#35) plaintiff's Eighth Amendment claims against defendants Hegge and Chacon, and
 14 plaintiff's Fourteenth Amendment claim against defendant Jimenez be granted and that these claims
 15 be dismissed with prejudice. The court now considers whether plaintiff exhausted his administrative
 16 remedies as to his First Amendment claim against defendant Herrera.

17 **2. Exhaustion of Plaintiff's First Amendment Claim Against Defendant Herrera**

18 Defendants argue plaintiff's First Amendment retaliation claim against defendant Herrera
 19 should be dismissed based on plaintiff's failure to exhaust his administrative remedies.⁷ Plaintiff
 20 claims he filed grievance 2006-27-00713 at the second level, and it "vanished" (#40, p. 2).⁸
 21 Plaintiff's informal grievance 2006-27-00713, submitted on March 23, 2008, is twelve pages long
 22 and in his opposition, plaintiff characterizes it as his "civil rights grievance" and as "the crux of this

24 ⁷ The court need not address defendants' arguments that plaintiff's claims against defendants
 25 Hegge, Chacon, and Jimenez are barred for a failure to exhaust because these claims are barred by the statute
 26 of limitations.

27 ⁸ In his opposition, plaintiff refers to another grievance regarding defendant Herrera that also
 28 "vanishe[d]" (#40, p. 8). However, this grievance appears to be about plaintiff's placement in segregation,
 29 which is unrelated to plaintiff's First Amendment claim against defendant Herrera. Moreover, plaintiff did
 30 not exhaust his administrative remedies with regard to this grievance (#40, Ex. B, p. 1).

1 litigation [sic] retaliation" (#35-3, Ex. D). As to defendant Herrera, plaintiff contends that at some
 2 point after he was placed in administrative segregation on February 17, 2008, defendant Herrera and
 3 two other correctional officers took plaintiff to what was called a "due process hearing," during
 4 which plaintiff was read his rights and told only that criminal charges were pending against him. *Id.*
 5 at D-2. The informal grievance was denied on March 27, 2008. *Id.* at D-13. Plaintiff then filed a
 6 first level grievance on April 7, 2008, which was denied on April 9, 2008. *Id.* at D-14-16.
 7 Defendants contend plaintiff failed to exhaust because he did not submit a second level grievance.
 8

9 Plaintiff claims that he did file a second level grievance on April 25, 2008, and attaches a
 10 copy to his opposition (#40, Ex. A-16-17).⁹ In this grievance, plaintiff states that defendant Herrera
 11 charged him with sexual assault, and that "being found guilty of a [sic] alleged felonious charge
 12 screams retaliation for filing this grievance." *Id.* Defendants do not include this second level
 13 grievance as an exhibit, but all parties agree that on July 27, 2008, plaintiff submitted an informal
 14 grievance to ask about the status of the grievance submitted on April 25, 2008 (#35-4, Ex. F; #40,
 15 Ex. A-13-15). Defendants responded that they had no record of plaintiff's second level grievance;
 16 therefore, it was deemed abandoned (#35-4, Ex. F).

17 In their reply, defendants fail to discuss plaintiff's proffered second level grievance at all,
 18 which presents a factual contention regarding whether plaintiff exhausted grievance number 2006-
 19 27-00713 to the second level.

20 The Ninth Circuit has held that where the record is unclear regarding whether plaintiff
 21 exhausted his administrative remedies, defendants do not meet their burden of proving non-
 22 exhaustion as a defense. *See Roby v. Stewart*, 368 Fed.Appx. 830 (9th Cir. 2010) (holding
 23 defendants did not meet their burden where plaintiff presented authenticated evidence that he could
 24 not grieve further). Because plaintiff presents evidence that he attempted to exhaust by filing a
 25 second level grievance, but did not receive a response, defendants do not meet their burden of

26 ⁹ Plaintiff filed a supplemental affidavit (#53) pursuant to this court's minute order, which
 27 offered plaintiff the opportunity to attest to the fact that grievance forms he submitted with his opposition
 are true and correct copies of forms he submitted to prison staff (#52). Plaintiff's exhibits are properly
 authenticated.

1 proving that plaintiff failed to exhaust his administrative remedies with respect to these claims. *See*
 2 *Wyatt*, 315 F.3d at 1119. The court recommends defendants' partial motion to dismiss (#35)
 3 plaintiff's First Amendment claim against defendant Herrera be denied.

4 IV. CONCLUSION

5 Based on the foregoing and for good cause appearing, the court recommends that defendants'
 6 motion to strike (#46) be granted. The court further recommends that defendants' partial motion to
 7 dismiss plaintiff's four claims as set forth in count I be **GRANTED** in part and **DENIED** in part
 8 (#35) as follows:

9 1. Plaintiff's Eighth Amendment claims against defendants Hegge and Chacon are
 10 barred by the statute of limitations and should be **DISMISSED with prejudice**;

11 2. Plaintiff's Fourteenth Amendment claim against defendant Jimenez is barred by the
 12 statute of limitations and should be **DISMISSED with prejudice**; however,

13 3. Defendants' motion to dismiss plaintiff's First Amendment claim against defendant
 14 Herrera is **DENIED** because defendants have not proven that plaintiff failed to exhaust his
 15 administrative remedies. The parties are advised:

16 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
 17 the parties may file specific written objections to this Report and Recommendation within fourteen
 18 days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
 19 Recommendation" and should be accompanied by points and authorities for consideration by the
 20 District Court.

21 2. This Report and Recommendation is not an appealable order and any notice of appeal
 22 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

23 V. RECOMMENDATION

24 **IT IS THEREFORE RECOMMENDED** that defendants' partial motion to dismiss
 25 plaintiff's four claims as set forth in count I be **GRANTED** in part and **DENIED** in part (#35) as
 26 follows:

27 1. Plaintiff's Eighth Amendment claims against defendants Hegge and Chacon are

barred by the statute of limitations and should be **DISMISSED** with prejudice;

2. Plaintiff's Fourteenth Amendment claim against defendant Jimenez is barred by the statute of limitations and should be **DISMISSED with prejudice**; however,

3. Defendants' motion to dismiss plaintiff's First Amendment claim against defendant Herrera is **DENIED** because defendants have not proven that plaintiff failed to exhaust his administrative remedies.

IT IS FURTHER RECOMMENDED that defendants' motion to strike (#46) be **GRANTED.**

DATED: December 8, 2011.

Valerie P. Booke

UNITED STATES MAGISTRATE JUDGE
